

BOOK REVIEWS

D. FRENCH; M. SAUL; N.D. WHITE, eds., *International Law and Dispute Settlement: New Problems and Techniques*, Hart Publishing, Oxford 2010, xxviii + 415 pp., UK£65.00/US\$130.00. ISBN 978-1-841-13912-8 (hardback).
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Through an exceptional collection of contributions covering a wide range of the currently available dispute settlement mechanisms, a fitting honour is given to one of the most influential scholars in the field: Professor John G. Merrills. Born on 13 May 1942, John G. Merrills studied at Queen's College, Oxford University (BCL and MA). He went on to Sheffield University in 1964, where he accomplished a brilliant academic career and eventually served as Dean of Faculty. He retired full-time from the faculty in 2007 and is now Emeritus Professor. From 1990 to 1998 he served as an alternate member in the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities. Additionally, in 2007 the Institut de Droit International welcomed him as an associate member. The bulk of Professor Merrills' writings relate to adjudication in human rights and international disputes, with some incursions into other fields besides his underlying general public international law expertise. However, it is no secret that his book on international dispute settlement, now in its 5th edition,¹ differentiated him as one of the most prominent scholars in this area of the law.

Acknowledging the above statement, *International Law and Dispute Settlement: New Problems and Techniques* seeks 'to complement ... [Merrills' *International Dispute Settlement*] by further exploring by means of a number of different perspectives the area of legal and judicial means and methods of settling disputes, specifically new problems and new techniques in these areas' (pp. ix). The volume includes a foreword by M. Evans, a Preface and an introduction, both by the editors. This last item, besides attempting to summarize and justify each contribution, also attempts to highlight the common features among them and to divulge a common thread that connects the approaches and topics therein: it is apparent that the overarching theme of the book is the question of the participation of non-state actors in dispute settlement mechanisms. Additional materials are a table of contents, a list of contributors, a list of abbreviations, a bibliography of the honoured author's work and an index.

The relatively modest number of selected texts (14 contributions) is compensated by the outstanding quality of each contribution. The essays have been grouped into three segments that try to reflect the multifaceted nature of dispute settlement: as an ever-changing discipline, as an accomplishing mechanism for substantive branches of law and as being subject to regional and cultural peculiarities.

The first part – 'The Changing Face of International Adjudication' – encompasses four topics that are forerunners of the evolving law of dispute resolution: crossovers of public

interests in private-nature international disputes, the consolidation and growing importance of environmental adjudication, the utilization of *soft* dispute settlement tools to enhance international organizations' governance and accountability mechanisms for businesses' 'misbehaviour in relation to human rights' (p. 88).

Chapter 1, 'Private Disputes and the Public Interest in International Law', is Professor Lowe's contribution, which he himself declares is a short one, overlooking the richness of its enticing content. He opens the debate by posing the question of whether private disputes can secure the fulfilment of public values. Lowe reflects on the rise of power of private corporations and the dependence of individuals and societies upon them; by means of governmental action, these private corporations have acquired a substantial amount of rights against states through the adoption of more than 2,500 Bilateral Investment Treaties (BITs) that determine not only treatment and protection standards but also rights of action against the state before several arbitration fora.² By adhering themselves to these BITs, in many cases lacking scrutiny by parliaments or public consensus, governments have pledged the interests of their citizens without proper regard to their rights. Lowe points out that certain trends towards reinstating public interest can be observed, such as the debate on the role of *amicus curiae* briefs before instances such as the Dispute Settlement Body (DSB) of the World Trade Organization (WTO)³ by Non-Governmental Organizations (NGOs) and others. The author retreats a few steps and rephrases his initial question by asking whether international adjudication is properly equipped to deal with sensitive public interests. He reflects on the consensual nature of international law and closes his contribution by affirming that international law cannot do everything, therefore some battles must be fought at the domestic level, relying on the accountability of governments towards their own electorates/population.

A monumental essay on the work of the International Court of Justice (ICJ) in environmental law is provided by Professor Fitzmaurice as the second contribution of the volume: 'The International Court of Justice and Environmental Disputes'. The article is divided into three parts. Part 1, 'Some General Issues Considered by the ICJ Which are Relevant to Environmental Disputes', where the author dwells particularly upon the work of the International Law Commission (ILC) related to state responsibility (and obligations *erga omnes* and *erga omnes partes*), the relevance of the *injured state* concept directly referring to standing before the Court and countermeasures as well as their inappropriateness when the Court has been seized. Part 2, 'Substantive Issues of International Environmental Law before the ICJ', contains four subdivisions, correspondingly: A. Nuclear Law, B. Water Law, C. Transboundary Air Pollution, and D. Land Degradation, where she analyses the contributions to environmental law by the relevant case law of the Court. Finally, part 3, 'Environmental Forums', brings in the discussion concerning the establishment of an international environmental court given the alleged unsuitability of the ICJ for those matters, including the rigidity of the right of standing, the length of ICJ cases where environmental degradation requires swift action⁴ and the technical character of environmental law, which the author contests on the basis of the ICJ's right to call experts.⁵ She also notes the failed experiment of the ICJ's Environmental Chamber as an

attempt to alleviate some shortcomings; at this point she could have referred to the existence of a similar chamber at the International Tribunal for the Law of the Sea (ITLOS) and the efforts of the Permanent Court of Arbitration (PCA) to provide environmental dispute-related *services*. In her conclusions, Professor Fitzmaurice condones the lack of depth in the Court's analyses of some environmental issues mainly due to the developing stage of the normative content – a questionable conclusion in light of the *Pulp Mills* decision, which this essay predates – and insists on the added value of its capacity to link environmental law to general international law.

Chapter 3, 'Complaint and Grievance Mechanisms in International Dispute Settlement', by Duncan French and Richard Kirkham explores the adoption of complaint and grievance mechanisms by international organizations. Although the article starts with a general statement, its focus is placed on the *ombudsman* mechanism, analysing the experiences of the World Bank (WB) Inspection Panel and mechanisms within the UN. The authors describe the figure as a novel one that arose at the domestic level in the last 50 years successfully enough to be transposed into the regional and international scene. Despite the enthusiastic approach towards the *ombudsman* mechanism, the authors acknowledge that so far its implementation within international organizations has been innocuous, lacking far-reaching powers, follow-up procedures or a comprehensive cross-institutional competence. In their words these 'mechanisms are not an institutional panacea for the perceived failings of international dispute settlement, and the truth is that such mechanisms should at best be considered supplementary procedures' (p. 85).

The essay is an interesting addition to the volume although in certain parts it is marked by repetitiveness; it seems as if the authors ran out of substantial content.

In Chapter 4 Sorcha Macleod discusses the issue of accountability for human rights violations by transnational corporations. From the notion of corporate social responsibility (CSR) the author analyses the two most relevant international efforts to establish mechanisms of accountability – a goal yet to be achieved – namely the UN Global Compact and the work of the Organization for Economic Co-operation and Development (OECD) for corporate governance. While these offer a starting point, the author warns that as they stand they cannot solve the global issue of business abusing human rights. One can agree with the author in her appreciation that this essay might appear to be misplaced, unless we are reminded of the importance of Merrills' contribution to the general debate on human rights protection and adjudication.

Part 1 of the volume leaves the reader somewhat perplexed concerning the purpose of the editors when entitling it 'Changing Face of International Adjudication' as only two of the contributions correspond to adjudicative means.

Part 2 – 'Problems and Techniques in Substantive Areas of International Law' – touches upon areas and techniques addressed by Merrills in his writings: human rights, the law of the sea, WTO disputes, the UN organs, environmental disputes and mediation. Crawford's collaboration seems to link itself with dispute settlement in a teleological manner, hence its inclusion in the volume.

In Chapter 5, Sandy Ghandhi offers a comprehensive view of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) Optional Protocol (OP) and its individual communication system through a comparison with peer treaty bodies such as the Human Rights Committee (HRC), the Committee on the Elimination of Racial Discrimination (CERD) and the Committee against Torture (CAT). By *arriving later*, the CEDAW OP incorporated solutions to limitations or complexities that those peers had faced. The author concludes, after dealing exhaustively with the OP and the practice of the CEDAW, that there is an intention to build a 'congruent and unified jurisprudence with the HRC, CERD and CAT' (p. 142).

Professor Robin Churchill highlights, in Chapter 6, current *trends* in the law of the sea dispute resolution, focusing on judicial and quasi-judicial means, an area that deserved a whole chapter of Merrills' *International Dispute Settlement*.⁶ After framing the position of the ICJ within that system, he discusses the novelties in the mechanism: ITLOS and Annex VIII Arbitration whose panels can engage both in diplomatic and judicial settlement. He masterly highlights ITLOS' most salient features; however, it is to be regretted that Professor Churchill's paper predates the new wave of case submissions to ITLOS, including its first maritime delimitation and a request for an Advisory Opinion by the International Seabed Authority. He then deals with dispute settlement under fisheries treaties and marine pollution. Thus, he dwells on the existence of several treaties in fisheries matters that create a network of interdependent and independent dispute settlement mechanisms gravitating around that of the UN Convention on the Law of the Sea (UNCLOS).⁷ In the case of marine pollution instruments, the compulsory settlement of disputes is generally absent and he deliberates over the relation of these types of disputes with issues of non-compliance, a situation that may hinder any willingness to invoke dispute settlement procedures.

Chapter 7 comprises Surya Subedi's excellent characterization of WTO's dispute settlement mechanism – another substantive area that commanded a whole chapter in Merrills' *International Dispute Settlement*.⁸ The author engages in an overarching survey of the mechanism, taking note of the most salient features of the latter, such as compulsory jurisdiction, the appeal mechanism, the strict timetable for the settlement of disputes, the flexibility embedded in the mechanism, transparency, the *negative consensus* rule, sequencing, the controversial issue of *amicus curiae* submissions, and, finally, the question of what role public international law plays within the mechanism. He rounds up his excellent piece with an overall assessment of the mechanism and a – disappointingly brief – account of the negotiations under the Doha agenda to reform what has been perceived as perfectible. The author's conclusions underscore the sense of unfairness that some developing countries express with regard to the applicable law, the possibility to enhance transparency and to allow non-state actors (especially affected businesses) to bring claims against WTO members.

Nigel White and Matthew Saul have crafted an extremely commendable scholarly contribution to the debate on the Security Council (SC) in Chapter 8. The authors state

that the SC has quasi-judicial powers – expressed or implied – and exercises them both under Chapter VI and Chapter VII. They contend that through the security, peacekeeping and dispute settlement powers vested on the SC, a (flawed) adjudicative process is being carried out, whether following several steps or none at all: investigation (fact-finding), adjudication and enforcement. Moreover, by combining several of those powers, the SC can effectively impose settlement terms by *proposing them* as recommendations and, if faced with rejection, coercing their acceptance by means of a threat of or the use of economic and/or military actions. They observe that the SC does not seem to pay attention to this when it is adjudicating in practice, thus failing to coat the latter with elements of due process and law abidance, hence weakening adherence to its resolutions and disrupting international law in the long term. They state that improvement in due process and transparency is easily realizable by means of openness and public deliberation. But they do make a reminder: the SC does have exceptional powers; however, those powers are not exceptional to the international legal order, but are rather exceptional *within* it.

This pivotal essay can only be praised both for its substantive content and for its clarity and methodological approach.

Chapter 9, by Karen Scott, reintroduces the reader to the realm of environmental law disputes by discussing the non-compliance procedures (NCPs) and other mechanisms embedded in multilateral environmental agreements in a highly technical manner (perhaps being inaccessible to the non-specialist). Substantively, the essay describes in detail the NCPs and highlights their linkage to other dispute settlement mechanisms, stating that the former cannot replace but rather complement the latter. She reflects on the positive effect of NCPs by enhancing the participation of non-state actors both in dispute *management* and decision making processes. She includes as appendices a list of NCP-related instruments and a table of features of NCPs.

Professor Scott's contribution is remarkably thorough. However, it could have benefited from a more explicit direction and a didactical approach to facilitate the grasping of its contents by the unfamiliar reader.

'The Antarctic Treaty after 50 Years' is Chapter 10 and one of the most ingenious pieces of the *Festschrift*. Professor James Crawford takes the reader through the Antarctic Treaty System (ATS) and related matters. By starting with the obvious that the Antarctic Treaty provides no dispute settlement mechanism, he reintroduces the paper to the general subject of the book by stating that the Treaty regime itself provides the principal device for the resolution of disputes. Crawford provides the reader with an overview of the issue of sovereignty under Article IV focusing on the maritime claims developed from the emergence of the Exclusive Economic Zone (EEZ) and the preemptory limit for submissions to the Commission on the Limits of the Continental Shelf (CLCS), affecting the *continental* claims on the Antarctic and on the sub-Antarctic islands whose maritime zones (EEZ and Outer Continental Shelf) encroach upon the maritime space below Parallel 60° S. Subsequently, he deals with emerging problems such as Antarctic Tourism, the overlap of the Antarctic Treaty Regime with several fisheries conventions, and with the

International Convention for the Regulation of Whaling (the ICJ is currently hearing the *Whaling in the Antarctic* case of 2010 – *Australia v. Japan*). In his conclusions, the author points out the weaknesses perceived especially in the light of the relationships between the ATS and other treaty regimes and warns of the risk posed by a ‘compelling case for resource exploitation’ (p. 295) to the survival of the regime.

In Chapter 11 the author Kisch Beevers makes a persuasive case for mediation, particularly in domestic family disputes, outlining its advantages which could merit its implementation in a cross-border fashion. After opening her essay with a quote from Merrills’ work⁹ on mediation, she accentuates the existing attempts and appraises its current state, singling out the efforts related to child abduction. As Merrills does in his book, Beevers carefully retains a balance in her paper by also pointing out the shortcomings, the unsuitability for some cases and the risks (costs, delay, duplicity), but she nevertheless advocates pursuing cross-border mediation. As most of the book is concerned with public law issues, this contribution is refreshing and provides valuable lessons to be learned from private law.

Part 3 of the book is dedicated to the ‘Regional dimension’ and comprises three articles dealing with regional courts, a dimension to which Merrills has always been sensitive, naturally focusing on EU bodies.

In Chapter 12 – ‘Aspects of the African Court of Justice and Human Rights’ – Professor Gino Naldi sketches the establishment of that Court, its composition and competence (including a remarkable endeavour to clarify the circumstances where the Court could be seized by non-state actors), sources of law and adjudicative features (provisional measures, non-appearance, judgments and advisory jurisdiction), closing his well-arranged essay with remarks on the challenges the African Court faces in becoming a relevant institution.

Chapter 13, by Tawhida Ahmed, gives a glance on the complex relationship between the EU and the Council of Europe and its courts, respectively, the European Court of Justice (ECJ) and the European Court of Human Rights (ECtHR), with regard to the protection of human rights. The article revolves mainly around the implications of the *Bosphorus* case of the ECtHR of 2006 for the relationship cited above, regretting that the decision was a missed opportunity to strengthen the protection of human rights under the European Convention on Human Rights (ECHR) with the excuse of attaining higher international cooperation with the EU and ECJ. He then advocates an outcome (a *modified Bosphorus Test*) which accommodates both goals (which are legitimate) without disproportionate negative effects on the effective protection of human rights within the European context.

This piece has the merit of bringing together ‘Problems’ and ‘Techniques’ in a specific branch and region while putting it into perspective within the greater framework of dispute settlement. It also fulfils a special duty within the *Festschrift* as the covered topic appears among the most favoured by Merrills throughout his career.

In the final contribution to the *Festschrift*, Paul James Cardwell probes the far-reaching consequences of three ECJ emblematic cases: *Pupino*, *Kadi* and the *MOX Plant* in the process of the constitutionalization of the EU legal regime as a distinctive and separate legal order that commands pre-eminence over the domestic legal orders of its 27 members but also – as seems to be the judicial policy of the ECJ – from the general international legal order. By claiming jurisdiction over all mixed agreements, regardless of whether there has been a full or substantial transfer of competences to the Union, the Court has notably expanded its jurisdiction and reduced the possibilities for its members to rely on *other* dispute settlement bodies besides the ECJ while closing the avenues for international law to enter the *legal space* of the EU unchallenged by the latter's instruments and Court, despite being, e.g., a SC resolution.

The article has a clear purpose and a defined structure and the author's reasoning is both accessible and easy to follow: simplicity and clarity which do not compromise quality and substance.

As an overall comment, the volume does justice to the honoured Professor Merrills. By joining under the same cover very different perspectives on current dispute settlement mechanisms this *Festschrift* offers the keen reader in any of the substantive areas covered – or even to the specialist in dispute settlement – the possibility to discover in its pages a fresh angle from which disputes can be tackled, very much in the same style as Professor Merrills' celebrated *International Dispute Settlement*.

Although the editors' offer is 'New Problems and Techniques', it is the opinion of this reviewer that – as appreciated through this review – they are rather contemporary issues: what this *Festschrift* does is to capture the current state of affairs in the area of dispute settlement as defined by the editors, although lacking complete novelty. A conscious effort to build on Merrills' previous work is evident despite not being limited to the content as evidenced especially by Chapters 3 and 10.

Different to many other collective works, the book manages to maintain a high standard throughout all the collaborations. The distribution of the articles within the three segments does not follow a traditional approach of types of means, but rather a more creative, although not perfect, logic. In particular, Chapter 4 shares more with essays in Part 2, instead of Chapter 8, that perhaps could have fitted into Part 1 instead. Due to spatial restrictions, possibly, the volume misses certain areas that could have been included, such as online dispute resolution (which possibly is a *newer* technique and poses *newer* problems than a few of the substantive areas covered in the book), a reference to the many evolvments in investment arbitration like dispute settlement Most Favoured Nation (MFN) clauses, or mass claims (which realizes the book's overarching topic of public participation), or a piece that maps *trends* within the system by means of practice and the preference or the avoidance of certain mechanisms over others.

Editing leaves nothing to be desired and, besides very few typographical mistakes or incomplete editing (cf. p. ix 'such as'; p. xxi and p. 49 'Columbia'; p. 19 'that that'; p. 294

‘Regulating’, *inter alia*), a delectable volume of superior quality, academic calibre, and worthy of frequent consultation has been produced. Undoubtedly it should stand as a natural complement to Merrill’s *International Dispute Settlement* in any library.

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1. J.G. Merrills, *International Dispute Settlement*, 5th edn. (New York, Cambridge University Press 2011).

2. The situation is further complicated by the use of MFN clauses, which effectively create a network of exchangeable treaty provisions to be used to the advantage of the complainant, applicable also (with some exceptions as developed in ICSID’s *Plama*, *Maffezini* and *Tecmed* cases) to dispute settlement provisions.

3. More recently, in the context of the Advisory Opinion requested by the International Seabed Authority to the Seabed Disputes Chamber of ITLOS, *amicus curiae* briefs were submitted by non-state actors – a clear example of *cross-fertilization* between adjudicating bodies. The Chamber followed the lead of the WTO in such matters, although without allocating them any value when rendering its decision.

4. In as much as promptness is not an inherent characteristic of the Court’s proceedings, it is noteworthy to acknowledge that it can show expediency, particularly within provisional measures procedures, as demonstrated in the *Avena & Others* case of 2008.

5. The reviewer wishes to highlight, however, the harsh criticism that the bench of the Court received after the *Pulp Mills* decision, precisely because of its dubious management of scientific evidence and its obscure *technical competence*.

6. Merrills, *supra* n. 1, Chapter 8 (pp. 167-193).

7. A further-developed essay on the matter offered by Professor Tullio Treves, ‘A System for the Law of the Sea Dispute Settlement’, in D. Freestone, R. Barnes and D. Ong, eds., *The Law of the Sea: Progress and Prospects* (Oxford, Oxford University Press 2006) Chapter 21.

8. Merrills, *supra* n. 1, Chapter 9 (pp. 194-218).

9. *Ibid.*, Chapter 2 (pp. 26-40).

M.W. JANIS, *America and the Law of Nations 1776-1939*, Oxford University Press, Oxford 2010, x + 232 pp. ISBN 978-0-19-957934-1.

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Any book that addresses America’s views on international law is to be welcomed, and any volume by Professor Janis is a treat. The present collection of essays, the widening and deepening of thoughts first expounded in 2004, is a timely one. The turbulent past decade has made Washington’s steadfast allies seriously question the wisdom of US foreign policy and its reliance on international law. The White House advocacy of pre-emptive strikes rather than peremptory norms wrong-footed the Old Continent which readily